

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
VARIANCE PERMIT ISSUED BY  
THURSTON COUNTY TO JAMES GRIGGS  
AND DENIED BY THE  
STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

JAMES A. GRIGGS and  
THURSTON COUNTY,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

SHB No. 83-31

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a decision by the State of Washington, Department of Ecology, disapproving a variance permit granted by Thurston County to James A. Griggs, came on for hearing before the Shorelines Hearings Board, Rodney M. Kerslake, Beryl Robison, Nancy Burnett and Lawrence J. Faulk, members, convened at Lacey, Washington on November 11, 1983. Administrative Law Judge William A. Harrison

1 presided. Member David Akana listened to the tape recordings and  
2 reviewed the record.

3 Appellant James A. Griggs appeared by his attorney, Robert E.  
4 Lundgaard. Appellant Thurston County did not appear. References to  
5 "appellant" hereafter refer to appellant James A. Griggs only.  
6 Respondent appeared by Jay J. Manning, Assistant Attorney General.  
7 Reporter Nancy J. Swenson recorded the proceedings. The proceedings  
8 were also electronically recorded.

9 Witnesses were sworn and testified. Exhibits were examined. From  
10 testimony heard and exhibits examined, the Board makes these

11 FINDINGS OF FACT

12 I

13 In 1980, appellant, James A. Griggs, bought a 1.3 acre site at the  
14 head of Fry Cove in Thurston County. He contemplated building his  
15 retirement home on the property.

16 II

17 In addition to the home itself appellant planned other  
18 improvements. A creek flows in a ravine on the sloping site. From  
19 this appellant would draw his water first by diverting it downhill to  
20 a storage tank, then pumping uphill to the homesite located some 12  
21 feet or so above the cove. Appellant also plans pools within the  
22 ravine as part of an extensive garden to be located there.

23 III

24 To accomplish the construction of the water storage tanks and  
25 garden pools, appellant believes that vehicles must be able to drive  
26 to the foot of the ravine where it opens onto the cove. The ravine,  
27

1 however, makes up only 1/3 of the site. When purchased, the other 2/3  
2 of the site contained a road ending at the 'ove but the steep hillside  
3 of the land intervening between the road and ravine extended fully to  
4 the soft tide lands, thus depriving appellant of the vehicle access he  
5 desired.

6 IV

7 Consequently, appellant acquired, free, from Thurston County, two  
8 surplus concrete piling, each 50 feet long and 18 inches in diameter.  
9 With a borrowed logging truck and his own tractor he succeeded in  
10 locating these, horizontally, on the tidelands some 14 feet waterward  
11 of the toe of the hillside. Using dirt excavated from the homesite in  
12 the hillside above, he then filled the area behind the concrete-  
13 piling bulkhead. The road was brought to one end of the fill and  
14 further filling was planned onward into the ravine. The evidence does  
15 not show that appellant made any communication to county government  
16 before or during this project.

17 V

18 The waters of the Frye Cove cause minimal erosion to appellant's  
19 hillside. Such bulkheading as would be necessary to provide erosion  
20 protection to appellant's residence, if any, could be constructed at  
21 the toe of the hillside rather than 14 feet out onto the tidelands.  
22 The 14 foot space is wider, even, than necessary to allow vehicle  
23 access. There is no proposal to withdraw this project from the  
24 tidelands when development in the ravine is complete. The scale and  
25 shape of the project establish that it is a private beach front

1 terrace in addition to whatever short term function it may serve as a  
2 construction road to the ravine. Appellant has constructed stairs  
3 down the steep hillside from the homesite to the project. He has not  
4 proven that such stairs built down into the ravine, and other  
5 materials transport systems, could not be used to build the desired  
6 improvements in the ravine from the homesite above, rather than from a  
7 tideland construction road.

#### 8 VI

9 Before more fill was placed, a county official encountered the  
10 project and ordered that no further work take place. The official  
11 also asked appellant to apply for a variance from the provisions of  
12 the Thurston Region Shoreline Master Program (TRSMP). Appellant did  
13 apply for a variance on December 6, 1982..

#### 14 VII

15 At the time appellant purchased his property, and at all times  
16 relevant to this matter, the appellant's shoreline was designated  
17 "conservancy" by the TRSMP. Section VIII, E-2.

#### 18 VIII

19 Within the conservancy environment, "Landfilling shall not be  
20 permitted for the purpose of creating new land area." TRSMP, Section  
21 IV, p. 47, Landfilling and Dredging, paragraph 1.

#### 22 IX

23 Within the conservancy environment:

24 Bulkheads may be constructed only to provide  
25 necessary protection to a residence or valuable  
26 historical site. 'Necessary' shall mean that  
27 physical damage to the structure or historic site is  
imminent.

1 TRSMP, Section IV, p. 52. Shoreline Works and Structures, paragraph 1.

2 X

3 Within the conservancy environment, "Bulkheads shall be  
4 constructed as close to the bank as feasible." TRSMP, Section IV, p.  
5 52, Shoreline Works and Structures, paragraph 3.

6 XI

7 The Thurston County Planning Department recommended that  
8 appellant's variance request be denied. Following public hearing, the  
9 Thurston County Hearings Examiner granted the variance on April 28,  
10 1983. The variance was then submitted to the Washington State  
11 Department of Ecology (DOE) which disapproved it on June 24, 1983.  
12 From this disapproval, appellant appealed to this Board on July 22,  
13 1983.

14 XII

15 Any Conclusion of Law which should be deemed a Finding of Fact is  
16 hereby adopted as such.

17 From these Findings the Board comes to these

18 CONCLUSIONS OF LAW

19 I

20 Appellant, the person requesting review herein, has the burden of  
21 proof. RCW 90.38.140(7).

22 II

23 Appellant's bulkhead and fill project is a "substantial  
24 development" as that term is used in the Shoreline Management Act at  
25

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1 RCW 90.58.030(3)(e) which states:

2 'Substantial development' shall mean any development  
3 of which the total cost or fair market value exceeds  
one thousand dollars,. . . (emphasis added).

4 Although built, in part, with surplus materials, appellant has not  
5 proven that the fair market value of his project does not exceed one  
6 thousand dollars. The function of the fill as a vehicle access  
7 disqualifies the project from the exemption for, "Construction of the  
8 normal protective bulkhead common to single family residences" found  
9 in the definition of substantial development at RCW  
10 90.58.030(3)(e)(ii).

11 III

12 Were appellant's bulkhead and fill project not a substantial  
13 development, it would nevertheless be a "development" as that term is  
14 defined at RCW 90.58.030(3)(d):

15 'Development' means a use consisting of the  
16 construction or exterior alteration of structures;  
17 dredging; drilling; dumping; filling; removal of any  
18 sand, gravel or minerals; bulkheading; driving of  
19 piling; placing of obstructions; or any project of a  
permanent or temporary nature which interferes with  
the normal public use of the surface of the waters  
overlying lands subject to this chapter at any state  
of water level. (Emphasis added.)

20 IV

21 Both a "substantial development" and a "development" must be  
22 consistent with the policy of the Shoreline Management Act and the  
23 applicable master program, here the TRSMP. RCW 90.58.140(1) and (2).

24 V

25 Appellant's bulkhead and fill project on the tidelands is

26 FINAL FINDINGS OF FACT,  
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1 inconsistent with: 1) the TRSMP prohibition against creating new land  
2 area by landfill, Section IV, p. 47; 2) the TRSMP rule permitting  
3 bulkheads only for necessary protection of a residence, Section IV,  
4 p. 52; and 3) the TRSMP rule that bulkheads shall be constructed as  
5 close to the bank as feasible, Section IV, p. 52. (See Findings of  
6 Facts VIII, IX, and X, above, for the text of these TRSMP provisions.)

7 VI

8 Under the Shoreline Management Act, at RCW 90.58.100(5) there is a  
9 provision for variance permits. Variance permits are to be allowed by  
10 provisions both in the master program (TRSMP) and in the rules adopted  
11 by the Department of Ecology (DOE) relating to establishment of a  
12 permit system. Id. As between the master program (TRSMP) variance  
13 rule and the DOE variance rule, the more restrictive applies.  
14 WAC 173-14-155. Any shoreline variance permit granted by a local  
15 government must be submitted to DOE for its approval or disapproval.  
16 RCW 90.58.140(12).

17 VII

18 In this case, appellant has placed landfill for the purpose of  
19 creating new land area. That is a shoreline use which is prohibited  
20 by TRSMP, Section IV, p. 47 in the conservancy environment. Both the  
21 TRSMP variance rule and the DOE variance rule disallow any variance  
22 which would authorize a prohibited use.<sup>1</sup> Appellant's variance  
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24 1. The TRSMP variance rule, Section VII, pp. 85-86, provides

25 Variances: [The Thurston County Hearings Examiner]  
may grant variances from the regulations of this

1 request was therefore properly denied by DOE.

2 VIII

3 Even were appellant's bulkhead and fill project not a prohibited  
4 use, his application would not meet the applicable DOE variance  
5 criteria, WAC 173-14-150(3) and (4).<sup>2</sup> Though a water storage tank  
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7 1. (Cont.)

8 Program, for reasons of promoting the public health, safety,  
9 and general welfare, subject to Department of Ecology  
10 approval; PROVIDED, that no variance will be granted which  
would permit a use otherwise prohibited outright in a  
particular environment... (Emphasis added.)

11 The DOE variance rule, at WAC 173-14-150(5) provides:

12 Requests for varying the use to which a shoreline  
13 area is to be put are not requests for variances, but  
14 rather requests for conditional uses. Such requests  
shall be evaluated using the criteria set forth in  
WAC 173-14-140.

15 At WAC 173-14-140(3) relating to conditional uses, it states,  
16 "Uses which are specifically prohibited by the master program may not  
be authorized." (Emphasis added.)

17 2. The applicable DOE variance criteria, at WAC 173-14-150, are:

18 (3) Variance permits for development that will be  
19 located either waterward of the ordinary high water  
20 mark (OHWM), as defined in RCW 90.58.030(2)(b), or  
21 within marshes, bogs, or swamps as designated by the  
department pursuant to chapter 173-22 WAC, may be  
authorized provided the applicant can demonstrate all  
of the following:

22 (a) That the strict application of the bulk,  
23 dimensional or performance standards set forth in the  
applicable master program precludes a reasonable use of  
the property not otherwise prohibited by the master  
24 program.

25 (b) That the hardship described in WAC  
26 173-14-150(3)(a) above is specifically related to the  
property, and is the result of unique conditions such  
as irregular lot shape, size, or natural features and

1 and garden pools in the ravine or even a waterfront terrace may be  
2 reasonable uses of appellant's property, appellant has not shown that  
3 these are precluded by the TRSMP prohibition against filling for new  
4 land in a conservancy shoreline environment. (See Finding of Fact V,  
5 above, regarding improvement of the ravine and Finding of Fact II,  
6 above, regarding the existence of a road ending at the cove, showing  
7 the possibility of a waterfront terrace at or beside its end, landward  
8 of the ordinary high water mark.) Thus, appellant would not meet  
9 WAC 173-14-150(3)(a) and (b). Although the project would not  
10 adversely affect public rights of navigation, -150(3)(e), it would not  
11 be compatible with other permitted uses, -150(3)(c); it would  
12 constitute a grant of special privilege, -150(3)(d), if it alone were  
13 allowed; or, would create disruptive cumulative effect inconsistent  
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15 2. (Cont.)

16 the application of the master program, and not, for  
17 example, from deed restrictions or the applicant's own  
18 actions.

19 (c) That the design of the project will be  
20 compatible with other permitted activities in the area  
21 and will not cause adverse effects to adjacent  
22 properties or the shoreline environment designation.

23 (d) That the requested variance will not  
24 constitute a grant of special privilege not enjoyed by  
25 the other properties in the area, and will be the  
26 minimum necessary to afford relief.

27 (e) That the public rights of navigation and use  
of the shorelines will not be adversely affected by the  
granting of the variance.

(f) That the public interest will suffer no  
substantial detrimental effect.

(4) In the granting of all variance permits,  
consideration shall be given to the cumulative impact  
of additional requests for like actions in the area.  
For example if variances were granted to other

1 with the policies of RCW 90.58.020 as implemented by the  
2 conservancy rules of the TRSMP if others were allowed, -150(4);  
3 and therefore would have a substantial detrimental effect on the  
4 public interest, -150(3)(f).

5 IX

6 Any Finding of Fact which should be deemed a Conclusion  
7 of Law is hereby adopted as such.

8 From these Conclusions the Board enters this  
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21 2. (Cont.)

22 developments in the area where similar circumstances  
23 exist the total of the variances should also remain  
24 consistent with the policies of RCW 90.58.020 and  
25 should not produce substantial adverse effects to the  
26 shoreline environment.

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ORDER

The Department of Ecology's disapproval of appellant's variance permit is affirmed.

DATED this 30<sup>th</sup> day of December, 1983.

SHORELINES HEARINGS BOARD

David Akana  
DAVID AKANA, Lawyer Member

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BERYL L. ROBISON, Member

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William A. Harrison  
WILLIAM A. HARRISON  
Administrative Law Judge

FINAL FINDINGS OF FACT,  
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